IN THE SUPREME COURT OF FLORIDA

CASE NO: 63,171

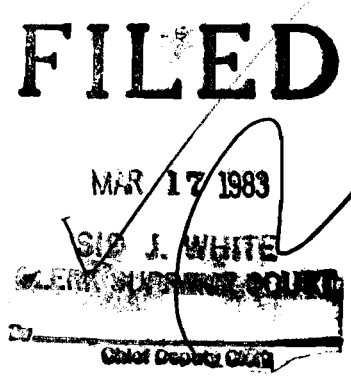
DORMAN K. KIMBRELL, JR., et ux.,

Petitioners,

vs.

PHILLIP PAIGE, EUGENE BERRIAN and ALLSTATE INSURANCE COMPANY,

Respondents.




ANSWER BRIEF OF RESPONDENT, ALLSTATE INSURANCE COMPANY, ON CERTIFIED QUESTION

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TABLE OF CONTENTS

## TABLE OF CITATIONS

## PREFACE

This case is before this Court on a certified question from the Fourth District Court of Appeal. The following symbol will be used:

(R ) - Record on Appeal

## STATEMENT OF THE CASE AND FACTS

On October 13, 1975, while in the course of his employment, Petitioner was involved in a motor vehicle accident with Respondent, Berrian, who was operating a motor vehicle owned by Respondent, Paige. After the accident, Petitioner claimed and was paid workers' compensation disability benefits. The compensation carrier, Great American Insurance Company, also paid medical bills incurred by Petitioner (R234-236).

On December 8, 1976, the claims manager for the compensation carrier advised Petitioner's attorney that the compensation carrier would file an action against the tortfeasors in accordance with §440.39, Fla. Stat., since the case was now in the second year (R195).

Petitioner's attorney took no action, and almost two years after the accident, on October 7, 1977, Great American Insurance Company filed a lawsuit for its own benefit and for the use and benefit of Petitioner (R209-211). The Complaint alleged:

> "6. As a direct and proximate result of defendants' negligence, DORMAN K. KIMBRELL, JR., was injured in and about his head, body and extremities, or alternatively aggravated pre-existing conditions, said injuries including loss of body functions and permanent injury with reasonable medical probability; he has suffered and will in the near future continue to suffer great mental and physical pain, all of which has been a great shock to his nervous system, that as a result of said injuries, he will be permanently handicapped and his earning capacity has been permanently impaired and he will suffer loss of future earnings; that he has been and will continue to be in the future kept from the normal

> pursuits of happiness and enjoyment of life; he has incurred hospital, doctor and related medical expenses in excess of $1,000 in an attempt to effect a partial recovery from his injuries and will incur hospital, doctor and related medical expenses in the future; he has sustained injuries that are both temporary and permanent; that his automobile was damaged and he has lost the value of its use during the time required for necessary repairs to it." (R210)

Amended final judgment was entered on the complaint on November 21, 1980 in favor of both the carrier and Petitioner (R222). This judgment was not appealed.

On November 9, 1978, over three years after the accident Petitioner's attorney undertook his first activity of record and filed a lawsuit against Respondents (R1-3). Respondent, Allstate Insurance Company, answered this Complaint by denial that there was any available insurance coverage for the loss (R4-6). After judgment was entered in the prior case, Respondents filed a Motion to Dismiss on the grounds that the lawsuit previously filed by the compensation carrier for the use and benefit of Petitioner, now reduced to judgment pursuant to §440.39, Fla. Stat., barred Petitioner from recovering in this action (R191).

The trial court entered an order dismissing Petitioner's complaint with prejudice (R204-206). The trial court found that only one lawsuit was proper under §440.39, Fla. Stat., and that the final judgment entered in the prior lawsuit operated as a bar to Petitioner's lawsuit. The court found that proper notice was given by Great American Insurance Company to Petitioner, who failed to take the necessary steps to prosecute his claim (R204-206).

Appeal was taken by Petitioner to the Fourth District Court of Appeal. That court held that the employee does not have a separate cause of action against the tortfeasor. On rehearing, the Fourth District certified to this Court the following question as one of great public interest:

> "Does Section 440.39(4), Florida Statutes (1981), bar a separate suit against a third party tort-feasor by an injured employee when such suit is filed more than one year after the cause of action accrued and the compensation carrier, in the second year following the accident, gave the thirty day notice of its intention to seek subrogation and filed an appropriate suit against the third party tort-feasor?"

## ARGUMENT

### SEPARATE SUIT IS BARRED BOTH BY FLORIDA STATUTE 440.39 AND BY PRINCIPLES OF RES JUDICATA.

Florida Statute Section 440.39 prohibits two suits against a third party as a result of a compensable injury to a worker. The applicable section of the Statute is as follows:

> "(4)(a) If the injured employee or his dependents, as the case may be, fail to bring suit against such third party tortfeasor within 1 year after the cause of action thereof shall have accrued, the employer, if a self-insurer, and if not, the insurance carrier, may, after giving 30 days' notice to the injured employee or his dependents and the injured employee's attorney, if represented by counsel, institute suit against such third party tortfeasor, either in his own name or as provided by subsection (3), and, in the event suit is so instituted, shall be subrogated to and entitled to retain from any judgment recovered against, or settlement made with, such third party, the following: All amounts paid as compensation and medical benefits under the provisions of this law and the present value of all future compensation benefits payable, to be reduced to its present value, and to be retained as a trust fund from which future payments of compensation are to be made, together with all court costs, including attorney's fees expended in the prosecution of such suit, to be prorated as provided by subsection (3). The remainder of the moneys derived from such judgment or settlement shall be paid to the employee or his dependents, as the case may be."

This subsection, standing alone, demonstrates that the Statute contemplates that the carrier will be entitled to sue for the entire value of the claim for its own use and for the use and benefit of the injured worker. It is instructed to:

(1) retain those amounts which it has paid for compensation and medical; (2) retain the present value of future compensation benefits payable in trust; and (3) the remainder of the moneys are to be paid to the employee or his dependents.

When Florida Statute 440.39 is considered in its entirety, it is clear that in the first, third and fourth years following an accident the right to sue is limited to the injured worker. There can be no second suit because the carrier is limited to its lien rights. During the second year as governed by Section 440.39(4)(a), the compensation carrier, after notice, may bring the action. However, the judicial gloss on this section is that the employee and compensation carrier have concurrent rights against the tortfeasor, but the right to proceed against the tortfeasor is limited to the one who files his cause of action first.

It is true that the statute does not specifically prohibit the filing of a second suit, but it is obvious that only one suit is contemplated against the tortfeasor. In Zurich Insurance Company v. Renton, 189 So.2d 492 (Fla.2nd DCA 1966), the Second District Court of Appeal discussed the legislative intent in allowing the compensation carrier to file an action during the second year post-accident. In the Zurich case, the court stated that "It is to be presumed that this was intended by the legislature as a matter of policy, thus to hasten the disposition of third party litigation." The Court went on to state that:

> "It is our view that by the only proper construction of Section 440.39, Florida Statutes, F.S.A., the right of action is concurrent during the second year after accrual of the cause of action. To hold otherwise would be to take from the injured employee or his dependents that very right of action, the encouragement toward diligent exercise of which we have previously held was the legislative intent." 189 So.2d 492 at 495.

In Maryland Casualty Company v. Simmons, 193 So.2d 446 (Fla.2nd DCA 1966), the court interpreted §440.39, Fla. Stat., with regard to the nature and extent of the compensation carrier's lien upon settlement. The court stated that "We believe . . . that Section 440.39 contemplates the filing of one suit only against the third party tort-feasor." (Emphasis added.)

In Jersey Insurance Company of New York v. Cuttriss, 220 So.2d 15 (Fla.3rd DCA 1969), the court held that "in the second year the injured employee and the carrier have concurrent rights against a third party tort feasor. But, the right to proceed against the tort feasor is limited to the one who files his cause of action first." (Emphasis added.)

This Court recognized that only one suit against an alleged tortfeasor is contemplated by §440.39, Fla. Stat., in the case of Aetna Casualty and Surety Co. v. Bortz, 271 So.2d 108 (Fla. 1972). As was indicated by the Fourth District, the Bortz case is not factually on all fours with the instant case. Nonetheless, the basic premise underlying that decision is that the Statute does not permit more than one suit to be brought for the claim of an injured worker against a tortfeasor.

The decision below contains an excerpt from the Bortz case. The excerpt emphasizes that the ultimate governance of the cause is within the province of the employer when suit is brought under subsection (4)(a). Cooperation by the claimant is expected since the employer is initiating the action for the claimant's ultimate use and benefit under the Statute. 271 So.2d 108, at 114.

In the Bortz decision, the Court examines the history of statutory schemes of subrogation and workers' compensation claims. It concludes:

> "The consequences of these successive revisions cannot be ignored. They represent a continuing legislative endeavor to balance respective interests in a manner consistent with the underlying theory that a double recovery should be avoided without extending tort immunity to strangers outside of the employer-employee relationship." See 271 So.2d 108, at 113.

That conclusion of this Court as to legislative intent is important in the context of the instant case. Assuming arguendo that Petitioner's position is adopted by the court, the consequence would be that a double recovery would result. The carrier has already obtained a judgment for the amount of its expenditures for medical, loss of wages and loss of wage earning capacity. These same items are claimed in Petitioner's suit which is the case before this Court. Since the payments to Petitioner under workers' compensation cannot be revealed to the trier of the facts, a double recovery is almost certain to occur. See §627.7372, Fla. Stat.

Further, as the Bortz decision points out, it was the legislative intent to provide an inducement for the injured

worker to initiate his own speedy remedy against the third party by filing suit within one year. If he failed to do so, the employer was then allowed to protect his interests by filing suit after the first year. 271 So.2d 108 at 112-113.

It is patent that if the Petitioner's contentions were to be adopted that the legislative purpose of the Statute as previously determined by this court would be entirely frustrated.

Petitioner is barred by principles of res judicata from proceeding with the second law suit. From Wade v. Clower, 94 Fla. 817, 114 So. 548 (1927), to the present, Florida courts have consistently adhered to the rule that:

> "'A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.'" 114 So. 548 at 552.

See also Knabb v. Duner, 196 So. 456 (Fla. 1940); Haskin v. Haskin, 63 So.2d 320 (Fla. 1953); and Pumo v. Pumo, 405 So.2d 224 (Fla.3rd DCA 1981), which are but a few of the myriad of cases so holding.

This case has exact identity of both the cause of action and the thing sued for with the prior case. The cause of action is that of personal injury to the Petitioner as a result of alleged negligence on the part of the individual defendants. The thing sued for in both cases is all of the elements of personal injury damaged allowed under Florida

law. Similarly, under the concept of privity, there is identity of persons and parties to the actions.

In this case, both the party plaintiff (Petitioner) and the parties defendant (Respondents) are in privity with and have identity with the parties in the prior suit. In the prior case, the Plaintiff, Great American Insurance Company, sued both for its own benefit and for the use and benefit of the Petitioner. Great American was a successor in interest to the claims of the Petitioner by virtue of the Statute, §440.39, Fla. Stat. Moreover, Chapter 440, by force of law, forms a part of every employment contract subject to its provisions. Pursuant to §440.41, Fla. Stat., the carrier is substituted for the employer and thus in the present context is in direct privity with the employee.

Similarly, the defendants in the former case were the owner and driver of the motor vehicle. In the present case, the same defendants are named and their alleged liability carrier is an additional named defendant. Although defendants' carrier has denied coverage by answer, that issue is not before the Court. The allegations of coverage in the complaint must be assumed to be true at this stage of the proceedings. The auto carrier is before this Court only on allegations of an automobile liability contract with the individual defendants. It is obvious that there is privity and hence identity of parties defendant in both the former and the present action.

In both instances, that of Great American on the

Petitioner's side and Allstate on the Respondents' side, their rights and obligations were derivative of and limited to those of the individual litigants in whose shoes they stood. This clearly satisfied the requirements of identity of persons and their capacity. See Jones v. Bradley, 366 So.2d 1266 (Fla.4th DCA 1979), and Rhyne v. Miami-Dade Water and Sewer Authority, 402 So.2d 54 (Fla.3rd DCA 1981).

Petitioner discusses at length the case of Rosenthal v. Scott, 150 So.2d 433 (Fla. 1961). This case must be considered in pari materia with Mims v. Reid, 98 So.2d 498 (Fla. 1957), in order to define the very narrow exception to the rule against "splitting a cause of action" carved out by the Scott case. In the Mims case, the injured sued for his personal injuries. He settled, and judgment was entered on the settlement. Meanwhile, he had collected his collision coverage from his own carrier and given it a loan receipt. The carrier sued in the insured's name for its use and benefit under the loan receipt. This Court held that the carrier's action could not be maintained. The Court said that it was committed to the majority view that if the defendant's wrongful act is single, the cause of action must be single and that the different injuries resulting are merely different items resulting from the same wrong.

In the Scott case, the injured insured gave his collision carrier a subrogation receipt upon their payment of his physical damage. The carrier sued the alleged tortfeasor which resulted in a dismissal with prejudice. When the

insured sued for his personal injury, the alleged tortfeasor raised the defense that the second suit violated the rule against splitting a cause of action. This Court at first followed the Mims case and upheld this defense. However, on rehearing, the Court distinguished Mims in substantial part upon the difference between a loan receipt and a subrogation receipt. Justice Hobson, writing for the Court on the rehearing, said:

> "We again recognize the majority rule against splitting a single cause of action, but we do not believe that said rule is controlling under the facts of this case." 150 So.2d 438.

To state that the Hobson opinion rested in great part upon equitable grounds is to belabour the obvious. Nonetheless, it was grounded upon a very workable premise that damage to one's auto is readily distinguishable from the claims arising from one's bodily injury. However, when the Petitioner seeks to extend this limited exception to the rules of "splitting a cause of action" or res judicata to a separation of various elements of a personal injury action, there are strong public policy reasons for rejecting Petitioner's contention.

Among these public policies which can be identified from decisions of this Court are:

(1) Prevention of double recovery on behalf of the injured.

(2) Promoting prompt assertion of the injured's claims.

(3) That litigation should have an end.

(4) That no person would be unnecessarily harrassed with a multiplicity of suits.

See Aetna Casualty and Surety Co. v. Bortz, 271 So.2d 108 (Fla. 1972), and Rosenthal v. Scott, 150 So.2d 433 (Fla. 1961). Apropos of the foregoing, it may be of interest to note that this is the third law suit to which Respondents have been subjected as a result of this single auto accident (R209-211, R1-3, and R82).

In the Scott case, this Court carved out a very workable exception to a common law rule. This exception was very much within the province of the Supreme Court of our State. However, in the case sub judice, Petitioner would have this Court perform more radical surgery to create a much broader exception. To do so would involve an invasion of the province of the legislature and do violence to concepts previously held by this Court to be legislative goals.

Finally, some comment should be made about the equities of the case at bar. The entire tenor of Petitioner's brief is couched in terms patently designed to appeal to the sympathies of the Court. More assuredly, this case is one where the old saw "Hard cases make bad law" should be heeded. The Petitioner's problems do not exist because both §440.39, Fla. Stat., and the common law prohibit bringing multiple actions for a single personal injury resulting from a single wrong. Petitioner's problems arise because his original attorney who was or should have been aware of §440.39, Fla. Stat., took

no action either within the first year post-accident or within the second year after receiving notification from the compensation carrier of its intent to file suit. Predicting solely from what appears of record here, Petitioner's cause of action for any losses resulting from that inactivity appears obvious.

Moreover, as suggested by the Fourth District, Petitioner may have a viable cause of action against the compensation carrier and its attorney who pleaded Petitioner's cause of action in every detail of damages. However, that attorney completely failed to communicate with Petitioner. Moreover, he failed to offer any proof of a substantial part of the allegations contained in that complaint when such proof was readily available.

In substance, the plea "Fiat justitia" may be applicable against those who have caused Petitioner's dilemma. However, to do justice to the entire community, the bar to a second suit required by public policy must be upheld.

## CONCLUSION

As a result of the statutory scheme apparent in §440.39, Fla. Stat., the Petitioner may not bring a second suit against the alleged tortfeasors. Moreover, Petitioner is prohibited from maintaining a second suit for personal injury because the principles of res judicata, including the prohibition against "splitting a cause of action", bar more than one action for a single injury arising out of a single wrong.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and accurate copies of the foregoing have been furnished to EDNA L. CARUSO, ESQ. and SCHULER & WILKERSON, P.A., Attorneys for Petitioners, Suite 4D, Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401; and to SAMUEL TYLER HILL, ESQ., 400 S.E. 6th Street, Fort Lauderdale, Florida 33301, by U. S. Mail, this 16th day of March, 1983.

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By 
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